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10UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GERALD B. MURPHY

Appeal 2009-001828
Application 09/777,761
Technology Center 3600

Decided: May 21, 2010

Before MURRIEL E. CRAWFORD, HUBERT C. LORIN, and BIBHU R. MOHANTY, *Administrative Patent Judges*.

LORIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Gerald B. Murphy (Appellant) seeks our review under 35 U.S.C. § 134 (2002) of the final rejection of claims 15 and 17-29. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We REVERSE and enter a new ground of rejection pursuant to 37 CFR 41.50(b). [1]

THE INVENTION

This invention is a method of creating marketing plans for an agricultural producer. Specification 6:3-5

Claim 15, reproduced below, is illustrative of the subject matter on appeal.

> 15. A computer-assisted method of providing agricultural marketing services to independent agricultural producers to assist in raising income of the agricultural producers, comprising:
>
> developing written agricultural marketing action plans for the agricultural producers, the agricultural marketing action plans requiring updated marketing information;
>
> tying financial obligations of the agricultural producers to the use of the written agricultural marketing action plans such that the agricultural producers are required to commit to using the

[1] Our decision will make reference to the Appellant's Appeal Brief ("App. Br.," filed Aug 13, 2007) and Reply Brief ("Reply Br.," filed Feb. 13, 2008), and the Examiner's Answer ("Answer," mailed Dec. 13, 2007).

written agricultural marketing plans as a condition for receiving financing;

electronically providing marketing information to the agricultural producers in order to update the written agricultural marketing action plans;

wherein the updated marketing information comprises probabilities of price targets;

wherein the step of developing written agricultural marketing action plans for each of the agricultural producers comprises:

(a) eliciting information from the producer;

(b) performing a financial assessment for an agricultural business of the independent producer;

(c) determining a financial assessment score based on the financial assessment;

(d) calculating a marketing financial risk score wherein the marketing financial risk score is defined as a numeric value describing financial risks related to markets and income of each agricultural enterprise associated with the agricultural business;

(e) determining pre-sell quantities using the financial assessment score, the marketing financial risk score and a price risk associated with a commodity market;

(f) calculating a level of crop revenue insurance to assure a predetermined level of income from sale of predetermined pre-sell quantities of crops for use in meeting the financial obligations, such that the financing is underwritten by pre-selling and the pre-selling is underwritten by the level of crop revenue insurance;

(g) forming a plan of action for agricultural marketing which makes decisions based on the marketing information, the financial assessment, the marketing financial risk

score, the pre-sell quantities, and the level of crop revenue insurance.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Schneider	US 6, 990, 459 B2	Jan 24, 2006
Remley	US 2002/0023052 A1	Feb 21, 2002
Hay	US 2002/0059091 A1	May 16, 2002

Daniel M. O'Brien. *Grain Marketing Plans For Farmers*. Kansas State University. July 2000. available at http://agmarketing.extension.psu.edu/Commodity/PDFs/mf2458.pdf. [Hereinafter, O'Brien].

Jack P.Friedman. *Dictionary of Business Terms* (Barron's Business Guides). (3rd Edition. 2000). [Hereinafter, Friedman].

The following rejections are before us for review:

1. Claims 15 and 29 are rejected under 35 U.S.C. §103(a) as being unpatentable over Hay, Remley, and O'Brien.
2. Claims 17 and 23 are rejected under 35 U.S.C. §103(a) as being unpatentable over Hay and O'Brien.
3. Claims 18 and 19 are rejected under 35 U.S.C. §103(a) as being unpatentable over Remley, Hay, and O'Brien.
4. Claims 20, 21, and 22 are rejected under 35 U.S.C. §103(a) as being unpatentable over Hay, O'Brien, and Friedman.
5. Claims 24-28 are rejected under 35 U.S.C. §103(a) as being unpatentable over Hay, O'Brien, and Schneider.

ISSUES

The first issue is whether claims 15 and 29 are unpatentable under 35 U.S.C. § 103(a) over the combination of Hay, Remley, and O'Brien. Specifically, the issue is whether Hay teaches a step of calculating a marketing financial risk, where the marketing financial risk score is defined as a numeric value describing financial risks related to markets and income of each agricultural enterprise associated with the agricultural business, as asserted by the Examiner. The rejection of claims 17 and 20-28 under 35 U.S.C. § 103(a) over Hay, O'Brien, Friedman and Schneider also turn on this issue.

The second issue is whether claims 18 and 19 are unpatentable under 35 U.S.C. § 103(a) over Remley, Hay, and O'Brien. Specifically, the issue is whether one of ordinary skill in the art would have been led by Remley, Hay, and O'Brien to a step of developing a strategic marking action plan which includes a determination of a marketing financial risk score defining financial risks related to markets and income of the producer.

FINDINGS OF FACT

We find that the following enumerated findings of fact (FF) are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

The scope and content of the prior art

Hay

1. Hay describes a method and apparatus that allows an agricultural entity to identify farms and areas to grow a crop of interest, price contracts to grow the crop of interest, and perform additional economic analysis related to the crop. Hay [0024].

2. Hay's paragraph [0052] states:

> The pricing engine 66 cooperates with the production estimator 62 and the risk identifier 64 to develop prices(s) to be offered the farm(s) to grow the crop of interest to the agricultural entity. For each farm, the pricing engine 66 develops the price to be offered based upon: (a) the expected yield of the subject farm, (b) the risk factor(s) for the subject farm, (c) the customer market price expected to be earned by the product of interest; (d) the profit to be earned by the farm for the competing product, and (e) the profit to be earned by the agricultural entity. Thus, the pricing engine calculates the price at which the farm(s) of interest would have a financial incentive to grow the crop of interest taking into account any premiums to be provided by the agricultural entity based upon the preceding factors (a) through (e). If a farm under analysis is associated with more than one elevator and/or loader, the offer developer 60 preferably determines the possible offer based upon the elevator/loader that will enable that farm to earn the highest profit.

3. Hay's paragraph [0051] describes a database of risk factors associated with the farm of interest.

4. Hay's paragraph [0065] describes a model for calculating the expected revenue of a farm.

Remley

5. In the rejection of claims 15 and 29, the Examiner cited Remley to teach tying financial obligations of the agricultural producers to the use of agricultural plans and that update marketing information comprises probabilities of price targets. Answer 4-5.

6. In the rejection of claim 18, the Examiner states that: "Remley does not disclose . . . a marketing financial risk score defining financial risks related to markets and income of the producer to assist in determining the assured income for the producer."

O'Brien

7. In the rejections of claims 15, 17, and 29, the Examiner cited O'Brien to teach receiving a price risk and calculating a level or crop revenue insurance. Answer 7-8 and 9.

8. In the rejection of claim 18, the Examiner cited O'Brien to teach implementing a strategic marketing plan, updating the strategic marketing plan, and underwriting the strategic marketing plan with crop insurance. Answer 12.

Friedman

9. The Examiner cited Friedman to teach a weighted Z score. Answer 12.

Schneider

10. The Examiner cited Schneider to teach calculating a level of crop revenue insurance as recited in claims 24 and 25. Answer 13-15.

Any differences between the claimed subject matter and the prior art

11. Hay does not teach a step of calculating a marketing financial risk score wherein the marketing financial risk score is defined as a

numerical value describing financial risk related to markets and income of each agricultural enterprise associated with the agricultural business.

The level of skill in the art

12. Neither the Examiner nor the Appellant has addressed the level of ordinary skill in the pertinent art of agricultural management and marketing. We will therefore consider the cited prior art as representative of the level of ordinary skill in the art. *See Okajima v. Bourdeau,* 261 F.3d 1350, 1355 (Fed. Cir. 2001) ("[T]he absence of specific findings on the level of skill in the art does not give rise to reversible error 'where the prior art itself reflects an appropriate level and a need for testimony is not shown'") (Quoting *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985)).

Secondary considerations

13. There is no evidence on record of secondary considerations of non-obviousness for our consideration.

PRINCIPLES OF LAW

Obviousness

> Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, and (3) the level of skill in the art. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 550 U.S. at 407 ("While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.") The Court in *Graham* further noted that evidence of secondary considerations "might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented." *Graham,* 383 U.S. at 17-18.

ANALYSIS

The rejection of claims 15 and 29 under 35 U.S.C. §103(a) as being unpatentable over Hay, Remley, and O'Brien.

Claim 15

Claim 15 recites a step of "calculating a marketing financial risk score wherein the marketing financial risk score is defined as a numerical value describing financial risk related to markets and income of each agricultural enterprise associated with the agricultural business." In the rejection, the Examiner cites paragraph [0052] of Hay to teach the step of calculating a marketing financial risk score. Answer 4. The Appellant argues that paragraph [0052] of Hay does not describe a marketing financial risk score. App. Br. 8-9 and Reply Br. 4. The Appellant states:

> In a production contract of Hay, there is no marketing as the producer does not own the crop grown, but rather agrees to produce a crop for a

> contracting company according to the specifications of the contracting company. In a product contract of Hay, there could be no marketing financial risk as there is no marketing of crops by the producer, because the producer does not own or sell the crop, but rather is paid for producing the crop for someone else. A production contract is unrelated to an independent marketing plan and does not provide for quantifying a marketing financial risk score.

App. Br. 8 (emphasis original).

The Examiner responds by additionally citing paragraphs [0051] and [0065] of Hay and asserting that Hay calculates the price at which the farm of interest would have a financial incentive to grow the crop of interest. Answer 19-20. Given this, the Examiner seems to be equating the calculated price to the claimed marketing financial risk sore.

We find that one of ordinary skill in the art would not have been led by Hay's description of calculating an offer price to the claimed step of calculating a marketing financial risk score. Claim 15 defines marketing financial risk score as "a numerical value describing financial risk related to markets and income of each agricultural enterprise associated with the agricultural business." Paragraph [0052] describes a price engine that is calculating a price to be offered to farms to grow the crop of interest, which is describes as "the price at which the farms of interest would have a financial incentive to grow the crop of interest." FF 2. The offer price is calculated based on: 1) the expected yield of the farms; 2) the risk factors for the subject farm; 3) the customer market price; 4) the expected profit for the farm and 5) the expect profit for the agricultural entity. *Id.*. Paragraphs [0051] and [0065] further describe the farm risk factors and the expected

profits (FF 3-4), which are used to calculate the offering price (FF 2). A step of calculating an offer price as described in Hay does not teach a step of calculating a marketing financial *risk score* that describes a financial risk related to markets and income of each agricultural enterprise associated with the agricultural business. The calculations described in Hay are acts that result in an offer price and not a marketing financial *risk score*. We note that the Examiner does not rely upon Remley or O'Brien to teach this limitation. *See* FF 5 and FF 7.

Further, we note that claim 15 further recites a step of using the marketing financial risk score to determine pre-sell quantities. Hay does not teach using the offering price to determine a pre-sell quantity of crops but instead uses the expected yield of the farm to calculate the offering price. FF 2.

Accordingly, we reverse the rejection of claim 15 under 35 U.S.C. § 103(a) as being unpatentable over Hay, Remley, and O'Brien.

Claim 29

Like claim 15, claim 29 also recites a step of determining a marketing financial risk score. Claim 29 recites "determining a marketing financial risk score associated with financial risks related to markets and income of each of the agricultural enterprises." For the same reasons as discussed above with regards to claim 15, we find that the rejection of claim 29 is overcome. Accordingly, we reverse the rejection of claim 29 under 35 U.S.C. § 103(a) as being unpatentable over Hay, Remley, and O'Brien.

The rejection of claims 17 and 23 under 35 U.S.C. §103(a) as being unpatentable over Hay and O'Brien.

Like claim 15 above, claim 17 recites the same step of calculating a marketing financial risk score and the same step of determining pre-sell quantities. In rejecting claim 17, the Examiner again cites to paragraph [0052] of Hay in the rejection to teach this limitation. Answer 8-9. The Examiner does not rely upon O'Brien to teach this limitation. *See* FF 5 and 7. For the same reasons as discussed above with regards to claim 15, we find that the rejection of claim 17 is overcome. Accordingly, we reverse the rejection of claim 17, and claim 23, dependent thereon, under 35 U.S.C. § 103(a) as being unpatentable over Hay and O'Brien.

The rejection of claims 18 and 19 under 35 U.S.C. §103(a) as being unpatentable over Remley, Hay, and O'Brien.

Also like claim 15, claim 18 requires a determination of "a marketing financial risk score defining financial risks related to markets and income of the producer to assist in determining the assured income for the producer." To reject claim 18, the Examiner admits that Remley does not disclose this step and again cites paragraph [0052] of Hay to teach this limitation. Answer 11. The Examiner then asserts that: "At the time of the invention, it would have been obvious to a person of ordinary skill in the art to combine the aforementioned features of Hay within Remley." The Examiner does not rely upon Remley or O'Brien to teach this limitation. *See* FF 6 and 8.

For the reasons given above, we find that one of ordinary skill in the art would not have been led the combination of Remley or Hay to a step of determining a marketing financial risk score as recited in claim 18. We find

that the rejection of claim 18 is overcome and, accordingly, we reverse the rejection of claim 18, and claim 29, dependent thereon, under 35 U.S.C. § 103(a) as being unpatentable over Remley, Hay, and O'Brien.

The rejection of claims 20, 21, and 22 under 35 U.S.C. §103(a) as being unpatentable over Hay, O'Brien, and Friedman.

This rejection is directed to claims dependent on claim 17, whose rejection we have reversed above. For the same reasons, we will not sustain the rejections of claims 20, 21, and 22 over the cited prior art. *Cf. In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992) ("[D]ependent claims are nonobvious if the independent claims from which they depend are nonobvious."). Further, we note that the Examiner does not rely upon Friedman to teach the limitation at issue with regards to independent claim 17 above. *See* FF 9.

The rejection of claims 24-28 under 35 U.S.C. §103(a) as being unpatentable over Hay, O'Brien, and Schneider.

This rejection is also directed to claims dependent on claim 17, whose rejection we have reversed above. For the same reasons, we will not sustain the rejections of claims 24-28 over the cited prior art. *Cf. In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992) ("[D]ependent claims are nonobvious if the independent claims from which they depend are nonobvious."). Further, we note that the Examiner does not rely upon Schneider to teach the limitation at issue with regards to independent claim 17 above. *See* FF 10.

NEW GROUND OF REJECTION

Pursuant to 37 C.F.R. 41.50(b), we enter a new grounds of rejection on claims 17-26 and 29 under 35 U.S.C. § 101.

We reject claims 17-26 and 29 under 35 U.S.C. § 101 as being drawn to nonpatentable subject matter.

First, taking claim 18 as representative for claims 18 and 19, claim 18 recites a method of providing assured income for agricultural crops. The method includes steps, and claim 18 is thus nominally drawn to a process. However,

> [T]he proper inquiry under § 101 is not whether the process claim recites sufficient "physical steps," but rather whether the claim meets the machine-or-transformation test. As a result, even a claim that recites "physical steps" but neither recites a particular machine or apparatus, nor transforms any article into a different state or thing, is not drawn to patent-eligible subject matter. Conversely, a claim that purportedly lacks any "physical steps" but is still tied to a machine or achieves an eligible transformation passes muster under § 101.

In re Bilski, 545 F.3d 943, 961 (Fed. Cir. 2008) (en banc)(footnotes omitted).

Claim 18 is not tied to a particular machine or apparatus nor does it transform a particular article into a different state or thing. Claim 18 recites nothing that would transform a particular article into a different state or thing. Further, claim 18 is not tied to a particular machine or apparatus. Claim 18 does not recite any machine or apparatus. Accordingly, we reject claims 18 and 19 under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

Next, taking claim 17 as representative for claims 17, 20-26, and 29, claim 17 recites a "computer-assisted" method of creating a strategic agricultural marketing plan for an agricultural business of an independent agricultural producer. The method includes steps, and claim 17 is thus nominally drawn to a process. Again, we apply the machine-or-transformation test above. Claim 17 recites nothing that would transform a particular article into a different state or thing. Therefore, the issue is whether claim 17 is tied to a particular machine or apparatus. While claim 17 does recite "computer-assisted" in the preamble, we find this a nominal recitation of structure which does not tie the claimed process to a particular apparatus. We note that the body of claim 17 does not include any recitations of a machine or apparatus. Accordingly, we reject claims 17-26 and 29 under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

Finally, claim 15 recites a "computer-assisted" method of creating a strategic agricultural marketing plan for an agricultural business of an independent agricultural producer. The method includes steps, and claim 15 is thus nominally drawn to a process. Again, we apply the machine-or-transformation test as above. Claim 15 recites nothing that would transform a particular article into a different state or thing. Therefore, the issue is whether claim 15 is tied to a particular machine or apparatus.

Like claim 17 above, claim 15 recites "computer-assisted" in the preamble and further recites that the step of "providing" is done "electronically." We find these to be a nominal recitation of structure which does not tie the claimed process to a particular apparatus. We note that claim 15 does not include any other recitations of a machine or an apparatus.

Accordingly, we reject claim 15 under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

CONCLUSIONS OF LAW

We conclude that the Appellant has overcome the rejection of:

claims 15 and 29 under 35 U.S.C. §103(a) as being unpatentable over Hay, Remley, and O'Brien;

claims 17 and 23 under 35 U.S.C. §103(a) as being unpatentable over Hay and O'Brien;

claims 18 and 19 under 35 U.S.C. §103(a) as being unpatentable over Remley, Hay, and O'Brien;

claims 20, 21, and 22 under 35 U.S.C. §103(a) as being unpatentable over Hay, O'Brien, and Friedman; and

claims 24-28 under 35 U.S.C. §103(a) as being unpatentable over Hay, O'Brien, and Schneider.

We enter a new ground of rejection for claims 17-26 and 29 under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

DECISION

The decision of the Examiner to reject claims 15 and 17-29 is reversed.

We enter a new ground of rejection on claims 17-26 and 29.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37

C.F.R. § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 C.F.R. § 41.50(b) also provides that the Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

> • (1) Reopen prosecution. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner . . . .
>
> • (2) Request rehearing. Request that the proceeding be reheard under § 41.52 by the Board upon the same record . . . .

REVERSED; 37 C.F.R. § 41.50(b)

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